



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

#13 / Appeal
Brief
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IN RE APPLICATION OF: Dave W. Gordon

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GROUP: 3728

EXAMINER: M. PATTERSON

TECHNOLOGY CENTER R3700

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10/22/02

ATTENTION: BOARD OF PATENT APPEALS AND INTERFERENCES

APPELLANT'S BRIEF (37 CFR 1.192)

This brief is in furtherance of the Notice of Appeal filed in this case on 08/09/02.

The fees required under §1.17(f) and any required petition for extension of time for
filing this brief and fees therefor are dealt with in the accompanying Transmittal of Appeal
Brief.

This brief is transmitted in triplicate.

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This brief contains these items under the following headings and in the order set forth below (37 CFR 1.192(c)):

- I. REAL PARTY INTEREST
- II. RELATED APPEALS AND INTERFERENCES
- III. STATUS OF CLAIMS
- IV. STATUS OF AMENDMENTS
- V. SUMMARY OF INVENTION
- VI. ISSUES
- VII. GROUPING OF CLAIMS
- VIII. ARGUMENTS: VIIC REJECTIONS UNDER 35 USC 102
- IX. APPENDIX OF CLAIMS INVOLVED IN THE APPEAL

I. REAL PARTY INTEREST

The real party in interest in this appeal is the party named in the caption of this Brief.

II. RELATED APPEALS AND INTERFERENCES

With respect to other appeals or interferences that will directly affect, or be directly affected by, or have a bearing on the Board's decision in this appeal, there are no such appeals or interferences.

III. STATUS OF CLAIMS (37 CFR 1.192(c)(1))

A. TOTAL NUMBER OF CLAIMS IN APPLICATION

The claims in the application are claims 9-13 and 15-16.

B. STATUS OF ALL THE CLAIMS

- 1. Claims pending: 9-13 and 15-16.

2. Claims rejected: 9-13 and 15-16.

C. CLAIMS ON APPEAL

Claims 9-13 and 15-16 are on appeal.

IV. STATUS OF AMENDMENTS

There are no outstanding amendments to the claims.

V. SUMMARY OF INVENTION (37 CFR 1.192(c)(3))

A thermal foot cover 10 has an upper cover portion 11 with an ankle opening 14 and a bottom panel 20 attached to the upper cover portion 11 to define a cavity 13 for receiving a boot or foot. At least a portion of the upper cover portion 11 has an outer covering 56, an inner covering 64 and a radiant barrier 60 sandwiched therebetween to reflect heat inwardly into the cavity 13. At least a portion of the bottom panel 20 may also have an outer covering 56, an inner covering 64 and a radiant barrier 60 sandwiched therebetween to reflect heat inwardly into the cavity 13.

VI. ISSUES (37 CFR 1.192(c)(6))

Whether claims 9-13 and 15 are unpatentable under 35 U.S.C., Section 103 under Bulzomi in view of Oatman or Latzke or Latzke in view of Bulzomi and whether claim 16 is unpatentable under 35 U.S.C., Section 103 under Bulzomi in view of Oatman or Latzke and further in view of Terry or Latzke in view of Bulzomi and further in view of Terry.

VII. GROUPING OF CLAIMS (37 CFR 1.192(c)(5))

The rejected claims stand or fall together.

VIIID. ARGUMENTS-REJECTIONS UNDER 35 U.S.C. § 103

37 CFR 1.192(c)(8)(iv)

Initially, the Examiner rejected some of applicant's claims under 35 U.S.C. § 102

as anticipated by Bulzomi. Applicant amended claims 9-13 and 15-16 to specifically require that applicant's radiant barrier is adapted to reflect heat inwardly into the cavity of a thermal foot cover. This requirement is opposite to the teaching of Bulzomi according to which heat is reflected outwardly away from the cavity of a foot cover.

After this amendment, the Examiner rejected claims 9-13 and 15-16 under 35 U.S.C. § 103 as unpatentable over Bulzomi in view of Oatman or Latzke or Latzke in view of Bulzomi (with respect to claim 16, the Examiner further relied on Terry as teaching an elastic ankle opening, and this reliance on Terry for this teaching is not now contested).

The Examiner, in a Final Office Action dated 4/11/02, relies on Bulzomi as the primary reference for all the claimed elements "except for the orientation of the radiant barrier layers." The Examiner argues, however, that "Oatman or Latzke teaches orienting radiant barrier layers so that they reflect the heat inwardly toward the wearer's feet (See Oatman abstract, last 5 lines or Latzke claim 2, lines 55-67)."

Latzke, however, does not teach a radiant barrier. Latzke teaches a heat **conductive** layer between thick foam layers of material. Latzke explains that the foam layers **store** body heat (Col.1, Ln.43-57; Col.4, Ln.46-49) and repeatedly states that the metal layer between the heat storing foam layers is heat **conducting** (Col.1, Ln.66; Col.2, Ln.6, 9-10, 64; Col.3, Ln.7; Col.4, Ln.41-42). That is, Latzke teaches that the layer sandwiched between the foam layers is a heat conductor, not a radiant barrier. This is contrary to applicant's claims which require reflection of heat by a radiant barrier into the cover. It is also contrary to Bulzomi's teaching which requires reflection away from the cover. As the Examiner admits, Bulzomi alone is insufficient to deny applicant's claims. Moreover, the teachings of Bulzomi and Latzke cannot be combined, since they are

opposed to each other. Furthermore, even if they are combined, neither teaches applicant's claimed device which requires a reflective barrier reflecting heat inwardly into the cover.

Oatman, in the abstract cited by the Examiner, teaches that "the **outer** surfaces of the insole are preferably provided with a heat reflecting coating or film. The reflective material is not disposed **between** the inner and outer layers as required by applicant's claims. Rather, Oatman's reflective material is on the outer surfaces of the inside and the other layers are in between. Oatman's layers, from top to bottom, are a reflecting film 50, an upper liner 20, an intermediate apertured layer 30 filled with particles 40, a lower liner 10 and a lower reflecting film 50 (Fig.4, Col.2, ln.34-Col.3, ln.2; Col.3, ln.14-18). Oatman specifically teaches the objective that, whether inserted right side up in one shoe or upside down in the other, "a heat reflecting layer will be disposed immediately adjacent to the bottom of the foot of the wearer" (Col.3, ln.18-22). Therefore, Oatman does not teach what applicant claims. Nor is Oatman's outer reflecting layer which reflects heat into the cavity properly combinable with Bulzomi's reflective material 6 which reflects heat away from the cavity (Col.3, ln.14-15). If Bulzomi's inner outwardly reflecting material is combined with Oatman's outer inwardly reflecting layer, heat is not reflected into the foot cavity area. If Bulzomi's inner outwardly reflecting material is omitted, the reference is meaningless.

Alternatively, the Examiner relies on Latzke as a primary reference, saying that "Latzke provides a radiant barrier layer (2) between inner and outer layers (1 and 3) and the use of such to reflect heat inward toward a wearer substantially as claimed except for the exact formation of the element of apparel, i.e., foot cover (note the discussion of foot coverings in column 7 lines 24-25)." The Examiner then combines Bulzomi as teaching

barrier layers incorporated in an upper and sole.

This argument again ignores, contrary to the Examiner's position, that Latzke teaches a conductive layer, not a radiant barrier, and that Bulzomi reflects outwardly, not inwardly.

In an Advisory Action dated 7/5/02, the Examiner further argues that: "Oatman and Latzke have not been applied as anticipatory references or as teaching for any specific layers, arrangement of layers, etc., they have been applied merely as a teaching for orienting a reflective layer to reflect heat inwardly towards a wearer."

Applicant has claimed specific layers and these references, which do not teach those specific layers, arrangement and purpose, cannot be combined without deference to applicant's blueprint, a combination inappropriate to obviousness arguments.

With respect to Latzke, the Examiner says that "the metal layer of Latzke is considered to be a radiant barrier inasmuch as applicant has defined such in the claims." Latzke teaches a conductive layer, not a radiant barrier as claimed by applicant. Indeed, lexicographers generally would say that the term conductive barrier is an oxymoron. The Examiner, or any other reader of Latzke, would not consider Latzke's conductive layer to be a radiant barrier unless they first had applicant's teaching and wanted the references to apply to it.

With respect to Latzke and Bulzomi being contradictory, the Examiner says "In response to applicants' argument that Latzke and Bulzomi are opposed to each other, this is true, however both devices are related to temperature control footwear. Bulzomi even discusses footwear to retain heat in column 1 lines 55-65."

The references are, therefore, admitted by the Examiner to be opposed to each

other. Furthermore, Bulzomi “discussion”, of footwear at column 1, lines 55-65 is merely a statement that some prior art patents “describe shoes as boots to insulate and retain heat within the shoe or boot . . .” Insulation and retention are not the same as radiation and no teaching of applicant’s specific layers is addressed.

For the above reasons, applicant submits that all of the claims are patentable over the cited references.

IX. APPENDIX OF CLAIMS (37 C.F.R. .192(c)(9))

The text of the claims involved in the appeal are:

1 9. A thermal foot cover for receiving a wearer's shoe-encased or boot-encased
2 foot or a wearer's foot comprising an upper cover portion having an ankle opening
3 therethrough and a bottom panel attached to said upper cover portion to define a cavity for
4 receiving the wearer's shoe-encased or boot-encased foot or wearer's foot, at least a
5 portion of said upper cover portion having an outer covering, an inner covering and a
6 radiant barrier sandwiched between said outer covering and said inner covering, said
7 radiant barrier being adapted to reflect heat inwardly into said cavity.

1 10. The thermal foot cover of claim 9, at least a portion of said bottom panel
2 having an outer covering, an inner covering and a radiant barrier sandwiched between
3 said outer covering and said inner covering, said bottom panel radiant barrier being
4 adapted to reflect heat inwardly into said cavity.

1 11. The thermal foot cover of claim 9, said bottom panel being a sole.

1 12. The thermal foot cover of claim 9 further comprising a cavity enlargement
2 means for facilitating insertion of the wearer's shoe-encased or boot-encased foot or the
3 wearer's foot into said cavity.

1 13. A thermal foot cover of claim 9 further comprising a bottom panel exterior
2 coating attached to said bottom panel outer covering to provide a non-skid surface on the
3 bottom of the thermal foot cover.

1 15. The thermal foot cover of claim 12, said upper cover portion comprising a first
2 top panel and a second top panel and said cavity enlargement means comprising a
3 fastener which attached said first top panel to said second top panel to facilitate insertion
4 of the wearer's shoe-encased or boot-encased foot or the wearer's foot into said cavity.

1 16. The thermal foot cover of claim 12, said cavity enlargement means comprising
2 an expandable ankle portion, said expandable ankle portion being adjacent to said ankle
3 opening and made of an elastic material.

Respectfully submitted,

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